JAN 7 PAGE 48

(2)

Supreme Court, U.S.
FILED
DEC 20 2004
OFFICE OF THE CLERK

No. 04-637

IN THE SUPREME COURT OF THE UNITED STATES

BETTY MITCHELL, Warden, *Petitioner*,

v.

JOHN DAVID STUMPF, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

A. The Sixth Circuit's decision exacerbates a circuit split regarding *Henderson v. Morgan*, and this case presents the proper vehicle for resolving the conflict 2

B. Stumpf fails to address either the conflict between the panel's decision and this Court's decision in *United States v. Ruiz*, or the panel's decision and the Fifth Circuit's decision in *Nichols v. Scott* 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Allen v. Mullin,
368 F.3d 1220 (10th Cir. 2004) 3, 6, 8

Gregory v. Solem,
774 F.2d 309 (8th Cir. 1985) 3, 5, 6, 7

Henderson v. Morgan,
426 U.S. 637 (1976) 1, 2–3, 7

Moore v. Armontrout,
928 F.2d 288 (8th Cir. 1991) 4, 5

Nichols v. Scott,
69 F.3d 1255 (5th Cir. 1995) 1, 9

Smith v. Groose,
205 F.3d 1045 (8th Cir 2000) 9

Stumpf v. Mitchell,
367 F.3d 594 (6th Cir. 2004) 5, 6, 7, 8

Thompson v. Calderon,
120 F.3d 1045 (9th Cir. 1997) 9

United States v. Ruiz
536 U.S. 622 (2000) 1, 8

INTRODUCTION

The petition showed that the decision below warrants review for two reasons. First, the decision exacerbates a circuit split regarding the framework announced in *Henderson v. Morgan*, 426 U.S. 637 (1976), for assessing whether a defendant's attorney adequately explained a plea—an issue that could arise in each of the hundreds of thousands of criminal cases every year in which the defendant pleads. Second, the Sixth Circuit's due process holding, predicated on the use of allegedly inconsistent evidence at a later trial of Stumpf's accomplice, is inconsistent with this Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), and creates a direct conflict with the Fifth Circuit's decision in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995).

In response, Stumpf attempts to sidestep the first issue. He asserts that the differing interpretations of *Henderson* among the Sixth, Eighth, and Tenth Circuits arise not from a dispute as to legal rules, but only differences among the facts in the various cases. See Stumpf Opp. Br. at 2–7. But that understanding is simply wrong. As we pointed out in our opening brief, two circuits (the Eighth and Tenth) both hold that under *Henderson*, the defendant bears the burden of establishing that his attorney did not adequately explain the plea, and that the defendant cannot rely on ambiguous evidence to overcome his express statement on the record that he was so informed. In the Sixth Circuit, by contrast, that is not so. The court expressly placed the burden of proving adequate explanation on the State. And then, despite Stumpf's express representation that his attorney had explained the plea, the court relied on decidedly ambiguous evidence to show the contrary. Thus, precisely the same record would lead to different results in these circuits. And, given the number of pleas each year, this lack of certainty presents an issue of paramount concern.

Stumpf's argument on the due process issue is equally flawed. Rather than addressing Petitioner's arguments, Stumpf asserts only that his case "corrects an injustice." *Id.* at 10. But Stumpf's personal sense of "justice" cannot reconcile the Sixth Circuit's decision below with this Court's decision in *Ruiz* or the Fifth Circuit's decision in *Nichols*. The Sixth Circuit's clear failure to follow this Court's mandates warrants certiorari, or perhaps even summary reversal.

A. The Sixth Circuit's decision exacerbates a circuit split regarding *Henderson v. Morgan*, and this case presents the proper vehicle for resolving the conflict.

1. In his opposition brief, Stumpf does not identify, much less reconcile, the conflicting *legal rules* developed by the circuits in the wake of this Court's holding in *Henderson v. Morgan*. The differing legal principles matter most, yet go wholly unaddressed in the respondent's focus on irrelevant factual details.

In *Henderson*, the Court recognized that in plea-withdrawal cases, the Court presumes that an attorney adequately explains the elements of the charge to his clients, especially when the attorney affirms as much on the record. This Court articulated that principle in holding that:

> [n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to *presume* that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

426 U.S. at 647 (emphasis added). Applying that principle, the *Henderson* Court found that the case there was "unique" "because the trial judge *found as a fact* that the element of intent was not explained to respondent." *Id.* (emphasis added). It was this factual finding, coupled with Morgan's "*unusually* low mental capacity," that compelled the Court to hold that Morgan's plea was deficient. *Id.* (emphasis added).

As the petition demonstrates, other courts, including the Eighth and Tenth Circuits, have properly concluded that *Henderson* places the burden upon the convicted defendant to show that he was not advised of a crucial element of the offense to which he pled guilty. See Pet. at 13–18. Indeed, the *Henderson* presumption—that defense counsel explained the charge to the defendant—applies even when the defense attorney has not stated on the record that he explained the elements of the offense to his client. See *Henderson*, 426 U.S. at 647; *Gregory v. Solem*, 774 F.2d 309, 313–16 (8th Cir. 1985).

The Tenth Circuit's recent decision in *Allen v. Mullin*, 368 F.3d 1220 (10th Cir. 2004), is illustrative. There, the court required a defendant to: "(1) show that the [intent] element was a critical element of [the charge]; (2) *overcome the presumption that his attorney explained this element to him at some other time prior to his guilty plea*; and (3) demonstrate that, prior to his guilty plea, he did not receive notice of this element from any other source." *Id.* at 1241 (emphasis added; alterations in original; internal quotation marks omitted). Similarly, the Eighth Circuit places the burden of demonstrating a lack of adequate explanation firmly upon the habeas petitioner, regardless of whether or not there is a statement on the record by defense counsel confirming that he advised his client regarding the charge. In *Gregory v. Solem*, 774 F.2d 309 (8th Cir. 1985), the Eighth Circuit rejected an involuntary plea claim when the defendant

"offered no evidence to rebut [the] presumption that his counsel explained to him the nature of the [] offense," *id.* at 316.

Indeed, *Moore v. Armontrout*, 928 F.2d 288 (8th Cir. 1991)—a case Stumpf fails to cite, much less explain—demonstrates the stark difference between the Eighth Circuit's approach and the one adopted below. The Eighth Circuit in *Moore* recognized "[t]he *Henderson* presumption that counsel explained the nature of the charge to the defendant," which gave "strong support" to "a specific finding of fact [by the state court] that the nature of the offense was fully understood." *Id.* at 293 (quoting *Gregory*, 774 F.2d at 315). And the *Moore* court relied on the plea colloquy described below—a colloquy virtually identical to the one Stumpf had here—as further evidence that the plea was voluntary:

> [The defendant] responded affirmatively when asked if he had discussed the charges with his attorney, if he was satisfied that his attorney had all the necessary facts to give adequate advice, if he had enough time to discuss the charges with his attorney, if he had been advised of his legal rights, if he was satisfied with the services of his attorney, and if he understood the consequences of a guilty plea and the range of punishment for the crimes to which he was pleading guilty.

Id. at 292. The court "refused to interpret *Henderson* broadly" and rejected Moore's claim. *Id.* Unlike the Sixth Circuit panel majority below, the Eighth Circuit in *Moore* did not place the burden on the State to provide extrinsic evidence to support the plea.

The Sixth Circuit below demonstrated a sharply different view of *Henderson*'s legal standards. Instead of applying the

Henderson presumption and requiring the defendant to prove otherwise, the panel did the exact opposite. And, rather than relying on the state trial court's finding of fact that Stumpf's plea was knowing and voluntary, the court below simply glossed over it. See App. 225a, 258a–59a. In fact, the panel engaged in its own de novo weighing of the facts, and in doing so it placed the burden *on the prosecution* to prove by extrinsic evidence that the plea was adequately explained. The court held that despite defense counsel's and Stumpf's assurances on the record that counsel had explained the charges to Stumpf, "the *state* bears the burden of showing the plea was voluntary, knowing and intelligent," and "the *state* has presented no *extrinsic evidence* to counter the record of the proceedings [below]." *Stumpf v. Mitchell*, 367 F.3d 594, 609 (6th Cir. 2004), App. 30a (emphasis added). The Sixth Circuit's insistence that it is the State that bears the burden of proof on adequate explanation, rather than the defendant, cannot be reconciled with the approach adopted in the Eighth and Tenth Circuits.

2. Stumpf's only response is that these divergent results merely reflect different facts, see Stumpf Opp. Br. at 6–7—but that argument is demonstrably wrong. Had the Eighth Circuit been presented with the record below here, it would have *rejected* Stumpf's claim. The Eighth Circuit would have begun with the assumption that Stumpf's counsel informed him of the elements, and it would have then recognized that the record here bolsters that conclusion. *Moore*, 928 F.2d at 292. Specifically, Stumpf's counsel confirmed on the record that he "informed [his] client of the elements of the offenses with which he [was] charged," *Stumpf*, 367 F.3d at 604, App. 19a, and Stumpf acknowledged on the record of the plea hearing that he "heard the questions . . . put to [his] attorneys," and that his "attorneys [had] informed and advised [him] as they say they have." *Id.* at 20a. The Eighth Circuit then would have required the *defendant* to *disprove* the presumption of

adequate explanation. *Gregory*, 774 F.2d at 316 (rejecting an involuntary plea claim when the defendant "offered no evidence to rebut [the] presumption that his counsel explained to him the nature of the [] offense"). Likewise, the Tenth Circuit would require the *defendant* to "overcome the presumption that his attorney explained [an] element to him at some other time prior to his guilty plea," *Allen*, 368 F.3d at 1241, something quite different than requiring the *State* to present "extrinsic evidence to counter the record of the proceedings [below]." *Stumpf*, 367 F.3d at 609, App. 30a. Here, as the record was devoid of any such evidence, courts in the Eighth and Tenth circuits would have rejected Stumpf's claim, while the court below instead upheld it. This stark contrast belies Stumpf's attempts to explain the conflict away on factual grounds.

And, in any event, Stumpf has failed to show that the records in these other cases are even materially different from Stumpf's; thus further undercutting his claims that the split merely reflects factual differences. For example, he asserts that *Gregory* was different from his case for two reasons: (1) there the defendant had effective assistance in the plea hearing, while Stumpf did not, and (2) the defendant there was "a person of at least average intelligence," *Gregory*, 774 at 315 n.5, while Stumpf is ~~not~~, Stumpf Opp. Br. at 6. With regard to the first, however, while it is true that the *Gregory* court stated that Gregory had effective assistance of counsel, it apparently reached that conclusion based solely on Gregory's own testimony. 774 F.3d at 316 (Gregory "stated at the post-conviction hearing that he was satisfied with his representation and was not alleging ineffective assistance of counsel. The fact that the plea bargain was made through and with effective assistance of counsel is strong evidence of the voluntary nature of the plea."). But here, just as in *Gregory*, Stumpf testified at the plea hearing that he was satisfied with the performance of his attorneys. *Stumpf*, 367 F.3d at 604, App. 30a (Stumpf answered "[y]es, sir" in

response to the trial court's question: "Are you satisfied with the services which [your attorneys] have performed for you?"). Moreover, Stumpf concedes that "[i]neffective assistance of counsel was not raised as an independent claim." Stumpf Opp. Br. at 6 n.1. Accordingly, the Sixth Circuit's conclusion that trial counsel's alleged errors "would manifestly constitute ineffective assistance," *Stumpf*, 367 F.3d at 610, App. 32a, is just speculation and fails to distinguish this case from *Gregory*.

The *Gregory* court's recognition in a footnote that the defendant was "a person of at least average intelligence," 774 F.3d at 315 n.5, similarly fails to factually distinguish that case from Stumpf's. Unlike the successful defendant in *Henderson*, who had an "*unusually* low mental capacity," 426 U.S. at 647 (emphasis added), the court below held that Stumpf had a "low IQ and has been found to be mentally and emotionally immature," *Stumpf*, 367 F.3d at 605, App. 32a. The district court itself had made no finding concerning Stumpf's mental capacity, and the only evidence on the issue came from Stumpf's expert who testified that Stumpf had an "IQ of 80, placing him at the lowest end of the *low average* range." D. Ct. Op. at 41 (Feb. 7, 2001); App. 240a (under its "Findings of Fact" heading, the state court noted "[t]he facts show the Petitioner to be of low, but normal, intelligence"). In other words, Stumpf had, at worst, low average intelligence and not the "*unusually* low mental capacity" warranting the judgment reached in *Henderson*. Thus, Stumpf's mental abilities are not so different from Gregory's as to support a different result under *Henderson*, if that case is understood the same way in the two circuits.

Stumpf's attempt to distinguish the Tenth Circuit's *Allen* decision on the grounds that "the record indicated that [Allen] received effective counsel" also fails. Stumpf Opp. Br. at 6. The *Allen* court never addressed the question of whether his counsel was effective in explaining the elements

of the charge. In any event, the critical comparison is between the actions of Allen's attorneys and the actions of Stumpf's attorneys. In both cases, counsel's testimony indicated that they explained the charges to their clients, and both defendants confirmed that their attorney had explained the charges to them. *Allen*, 368 F.3d at 1242; *Stumpf*, 367 F.3d at 604, App. 20a. The comparison between counsel here and in *Allen*, then, proves that factually, they received the same assistance, but the courts arrived at opposite results.

As there are no material factual differences among the cases comprising the circuit split, the differing judgments can only be explained by the respective circuits' different legal interpretations of *Henderson*. These starkly differing interpretations warrant immediate review, and this case is an ideal vehicle for undertaking it.

B. Stumpf fails to address either the conflict between the panel's decision and this Court's decision in *United States v. Ruiz*, or the panel's decision and the Fifth Circuit's decision in *Nichols v. Scott*.

This Court's recent decision in *United States v. Ruiz*, 536 U.S. 622 (2002)—another case that Stumpf fails to cite, much less explain—forecloses the result reached by the court below concerning Stumpf's due process claim. In *Ruiz*, the Court held that the Constitution does not require a prosecutor to disclose exculpatory impeachment information before a defendant enters a plea agreement. *Id.* at 633. It follows that if a plea-bargaining defendant had no right to receive impeachment evidence inconsistent with his guilt, he cannot later claim a constitutional violation because the prosecution later used evidence that was inconsistent with Stumpf's own plea. This is especially true when, as here, the inconsistent evidence did not even exist at the time of the plea hearing. As the Court recognized in *Ruiz*, "impeachment information is special in relation to the *fairness of a trial*, not in respect to

whether a plea is *voluntary*." *Id.* at 629 (emphasis in original). Any fairness notions related to the evidence used to convict Stumpf's accomplice Wesley go only to the fairness of a trial, which Stumpf waived by pleading guilty. And while it is true that other circuits have found due process violations for inconsistent prosecution theories, those cases did not involve the creation of the right in the context of plea hearings, only full criminal trials. See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *vacated on other grounds*, 523 U.S. 538 (1998).[1]

The panel decision also conflicts with the Fifth Circuit's decision in *Nichols v. Scott*, 69 F.3d 1255 (5th Cir. 1995), involving separate trials for two men who each fired shots at a store clerk. The prosecutor argued that each particular defendant fired the fatal bullet. The district court granted habeas relief to the defendant with the later trial, but the Fifth Circuit reversed the holding (one remarkably similar to the Sixth Circuit's holding below) that "the due process boundary upon prosecutorial conduct and the appearance of basic fairness . . . constitutionally estopped [the state] from obtaining a fact finding in one trial and seeking and obtaining an inconsistent fact finding in another trial." *Id.* at 1268 (emphasis and internal quotation marks omitted). The court held that "allowing persons to claim collateral estoppel benefits of an adjudication to which they were strangers can hardly be considered as mandated by historic concepts of fundamental fairness or due process." *Id.* at 1270; see also *id.* at 1272 ("there is no indication in the authorities that

[1] The *Thompson* majority did not hold that inconsistent theories created a due process violation, but instead resolved the case on ineffective assistance of counsel grounds. 120 F.3d at 1051–55. Several judges participating in the *en banc* panel in *Thompson*, however, took the view that inconsistent prosecution theories violated due process principles. *Id.* at 1063–64 (Tashima, J., joined by Thomas, J., concurring), 1071 (Kozinski, J., joined by Nelson, J., dissenting).

[estoppel] is constitutionally mandated"). And, in Stumpf's case, Stumpf was the first of the two codefendants to be found guilty, making the Sixth Circuit's holding even more incongruous.

Instead of responding to these specific arguments, Stumpf only claims that the panel's decision "is consistent with this Court's precedent" (although he does not cite anything of relevance) and that "the Sixth Circuit reached a fair and just conclusion." Stumpf Opp. Br. at 8. Stumpf's exclusive focus on the perceived equities, as well as his failure to even respond to the Petitioner's legal arguments, offer nothing to dissuade the Court from granting the petition and addressing the Sixth Circuit's flawed due process analysis.

CONCLUSION

For the above reasons, and those in the Petition for Certiorari, the petition should be granted, or in the alternative, the judgment below should be summarily reversed.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
DIANE RICHARDS BREY*
Deputy Solicitor
*Counsel of Record
CHARLES L. WILLE
HENRY G. APPEL
STEPHEN E. MAHER
FRANKLIN E. CRAWFORD
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Petitioners

December 20, 2004